United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Corrected

74-2391

To be argued by
PHYLIS SKLOOT BAMBERGER

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER A. PEPE and
JOHN E. COUGHLIN,

Appellants.

Docket No. 74-2391
Docket No. 74-2441

BRIEF FOR APPELLANT
JOHN E. COUGHLIN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT JOHN E COUGHLIN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the refusal of the District Judge to give the jury an instruction of the defense of alibi, as requested by the defense, was error requiring reversal.

STATEMENT PURSUANT TO 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel) rendered on October 23, 1974, convicting appellant of armed bank robbery and sentencing him to five years in prison.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Coughlin and Peter Pepe were indicted for conspiracy to rob a bank (count 1), bank robbery (count 2), bank larceny (count 3), and bank robbery while armed (count 4).*

The evidence presented by the Government showed that on October 30, 1972, at about 11:30 a.m. (29, 87**), three men robbed the Empire National Bank, a bank insured by the Federal Deposit Insurance Company (111), and took from that bank $31,000 (112). Tellers, bank officers, and

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* The indictment is annexed as B to appellant's separate appendix.

** Numerals are references to pages of the trial transcript.

bank customers could not identify the people involved in the crime because they wore ski masks (33, 61, 78, 88) and coats (29, 33, 61, 78). Testimony as to the height of the robbers conflicted. One of the witnesses said the robbers were tall (29, 95) and another that they were average height (65-6). All agreed that one was shorter than the other two (67, 81). One carried a gun (30, 61, 78) which one witness said resembled a magnum (79).

Between 11:00 a.m. and 12:00 noon on October 30, three men were seen running from the bank (88) carrying white sacks. They got into a large green car (89). At about 11:45 p.m., an FBI agent found a green car in an A&P parking lot near the bank (99).

The only witness to connect appellant and Pepe to the crime was Walter Burton, co-conspirator, who upon his arrest was charged with five bank robberies (113-4). He pleaded guilty to those five and agreed to cooperate upon a promise by the Government that the prosecutor would recommend a twenty-year sentence for the five crimes (114) and not prosecute for eight other robberies (115).* In addition to the bank robberies, Burton had been involved in a shoot-out while attempting to escape after one of the robberies, and

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* The robbery involved in this case was one for which Burton was not to be prosecuted (119).

had been charged with attempted murder in Connecticut (115) for which he had been convicted and sentenced to a term of 16 to 32 years.*

Burton described how he, appellant, and Pepe** robbed the bank. According to Burton, he discussed the robbery with appellant and Pepe about a week before it took place, at which time they drove to the bank, went in, reviewed the escape route (127), and decided to use an A&P parking lot to change cars (118).

On the day before the robbery they met at Pepe's house and reviewed the equipment to be used (128A), including three loaded guns (129). All the equipment was put in a sack which was then placed in a white Volkswagon belonging to Gwenn Fortman, Burton's girlfriend (130). The three men agreed to meet at the Stratford Motor Inn after the robbery (130).

According to Burton, they met the next morning. Burton was in the Volkswagon and appellant and Pepe in Pepe's Cadillac (131). They parked the cars in the A&P parking lot (131). They then stole another car, a green Mercury (132), and returned to the A&P lot.

After the bank robbery, they drove in the stolen car to the A&P parking lot and got into their own cars.

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* This term was to run concurrently with the 32-year term of imprisonment which had ultimately been imposed for the five bank robberies (115).

** Burton said he had known Pepe for 15 years and appellant for two years (123).

They next met at the Stratford Motor Inn (140). Burton arrived first and was met by appellant and Pepe, now in Pepe's Chevrolet (140). Appellant rented a hotel room (141). After going into the room, the men received a call from the desk and saw someone writing down their car license plate numbers (142). Suspicious, the three men left and went to the Howard Johnson Motel (142).

Robert Corcoran, an employee of the Stratford Motor Inn, (314), signed in a guest on October 30, 1972. He noticed that after registering the guest was speaking with two other men (322) near a Volkswagon and a Chevrolet parked outside (323). He noticed that the driver's licenses listed on the motel registration form differed from the licenses on the two cars and changed the license numbers on the card to J.P. 9934 (Chevrolet) and L.H. 4808 (Volkswagon) (323). Mr. Corcoran could not identify the guest who registered. A Government handwriting expert testified that appellant's fingerprints were on the Howard Johnson Motor Lodge registration card (251) stamped October 30, 1972, at 2:41 p.m. (241).

In defense, Anderson Atkinson testified that while he was in prison with Burton they became good friends and that Burton said he was going to frame appellant and Pepe so as to protect himself and his friends (355-372).

Florence Stefane testified on behalf of appellant. She testified that she had met him at the bar where she worked, and that she had also met Burton there (40). She said that on one occasion she had heard Burton threaten appellant (404). She said that she had had a date with appellant on October 30, 1972, and that appellant got to her house at about 9:30 a.m. (399). About an hour later they drove in a car borrowed from Pepe to Pepe's house (400). They arrived there at about 10:30 and stayed for about an hour (401). Then they drove, again in Pepe's car, to West Haven for lunch (402). After lunch, they went to the Stratford Motor Inn (412) and appellant registered (413). While they were still in the parking lot, a white Volkswagon driven by Burton drove up (413). After a short conversation with Burton, appellant drove Mrs. Stefane to the room, and after a few seconds, Burton knocked and asked to use the room (416). They then drove to the Howard Johnson Motel (417).

Mrs. Stefane testified that appellant was arrested at her home, but that at the time the agents came, she did not know appellant was in the house because she had arrived home only a few minutes earlier (445-446).

Rhonda Pepe testified on behalf of Pepe. She corroborated Mrs. Stefane's testimony that appellant had borrowed Pepe's car and that Mrs. Stefane and appellant had visited the Pepe household at about 11:30 a.m. on October 30.

In rebuttal, the Government called FBI agent George Phillips, who testified that he was watching the home of Mrs. Stefane. He entered her home, looked for appellant, and found him hiding behind a partition in the attic (517).

Counsel for appellant requested that the judge instruct the jurors as to "an alibi charge to the effect that they may find that alibi is sufficient to create a reasonable doubt where it otherwise would not have been"(558).

Judge Frankel responded:

> As to your request about alibi, it seems to me that I can't give it to you both ways. If I grant that, I am going to give the thing about flight and the use of false names.
>
> MR. THAU: In that case I withdraw it.
>
> THE COURT: If you withdraw it, then I let it go at that. I am not sure I would give it to you anyhow, but I was trying to show you the implications of your position from my point of view.

(559)*

In the course of his charge ** to the jurors, the Judge defined reasonable doubt (634) and explained conspiracy, elaborating on the meanings of "knowingly and willfully"

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* At the conclusion of the evidence, Judge Frankel had ruled that he would not accept the Government's request to instruct the jury concerning the implications of evidence of flight, saying, "I don't charge about matters of fact as if they were legal things."

** The charge is annexed as C to appellant's appendix.

(648-9). He also charged extensively on credibility of witnesses.

At the conclusion of the charge trial counsel for appellant requested an alibi charge.

> MR. THAU: Your Honor, the Court charged at great length on willfulness and knowingly, and so on, almost presuming that the Defnedants [sic] had been present at the bank, and that their intentions were in question or ought to be decided by the jury.
>
> Under these circumstances, I would ask the Court to charge addtionally [sic] that in the event that they have a reasonable doubt that either or both of these Defendants was at Hyde Park at 11:30 in the morning or thereabouts on October 30th, 1972, they should acquit, regardless of anything else in the case.
>
> (669)

The Judge denied the request.

After deliberations, the jurors convicted appellant and Pepe.

ARGUMENT

THE REFUSAL OF THE DISTRICT JUDGE TO GIVE THE JURY AN INSTRUCTION OF THE DEFENSE OF ALIBI AS REQUESTED BY THE DEFENSE, WAS ERROR REQUIRING REVERSAL.

The Government presented evidence primarily through the testimony of a highly impeachable co-conspirator that he, appellant and Pepe had robbed a bank. Both appellant and Pepe presented alibi defenses. Appellant called his former girlfriend, Florence Stefane, who testified that she had a date with appellant on the day of the robbery and she detailed the events of the day. Pepe's evidence came through the testimony of his wife, who corroborated Mrs. Stefane's version of the events as to the critical time period - approximately 11:30 a.m. on October 30, 1972. Both witnesses testified that they were with Pepe and appellant at Pepe's home at this critical time.

Defense counsel requested that the District Judge instruct the jury about the alibi defense. Counsel requested:

> . . . an alibi charge to the effect that they may find that alibi is sufficient to create a reasonable doubt where it otherwise would not have been.

(558)

The District Judge refused to give the charge, stating the evidence of alibi was a factual issue to be argued to the jury. At the end of the charge, counsel again requested the instruction and again it was denied.

It is established that, if requested, a defendant is entitled to have the jury instructed as to a defense theory of the case which is supported by law and some evidence. Bird v. United States, 180 U.S. 356 (1901); United States v. Tashman, 478 F.2d 129 (5th Cir. 1973); United States v. Vole, 435 F.2d 774 (7th Cir. 1970); United States v. Grimes 413 F.2d 1376, 1378 (7th Cir. 1969); Strauss V. United States, 376 F.2d 416 (5th Cir. 1967); Perez V. United States 297 F.2d. 12, 15-16 (5th Cir. 1961); Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951). This general rule applies as well to a defense of alibi, and the failure to give an instruction to the jury on this defense is reversible error. United States v. Booz, 451 F.2d. 719 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973); United States v. Megna, 450 F.2d 511 (5th Cir. 1971); United States v. Marcus, 166 F.2d 497, 504(3d Cir. 1948); see United States v. Barrasso, 267 F.2d 908 (3d Cir. 1959).

The primary purpose of giving a charge on a defense is to instruct the jurors as to the effect on the Government's burden of proof of the presentation of evidence

by the accused. This in turn affects the way in which the jurors evaluate the prosecution's case:

> If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the Government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the Government has not proved the guilt of the accused beyond a reasonable doubt.
>
> United States v. Marcus, supra, 166 F.2d at 504

See also United States v. Booz, supra.

Thus, it is critical for the jurors to understand that the accused has no burden of proof with respect to a defense, including alibi. United States v. Beedle, 463 F.2d 721 (3d Cir. 1972); United States v. Houston, 434 F.2d 613 (5th Cir. 1970); see also Thomas v. United States, 213 F.2d 30, 33 (9th Cir. 1964). All that need be done by the defense evidence of alibi is to create a reasonable doubt as to the defendant's presence at the scene of the crime (United States v. Booz, supra; United States v. Houston, supra). Thus, the jurors need not believe that the defendant was elsewhere; they need only have some doubt as to the defendant's

whereabouts at the time of the crime. United States v. Barrasso, supra. If such a doubt exists, the jurors must acquit.

Here, counsel expressly requested the precise instruction held by the courts to be appropriate and required. The Judge refused to charge stating it was a factual issue to be argued by counsel. However, as the precedents make clear, the presentation of evidence by the defense necessitates instruction on how the evidence is to be used by the jurors in determining whether the Government has met its burden of proof, and this is a legal issue of great significance.

The inclusion in the charge as it was given of an instruction that the Government has the burden of proving guilt beyond a reasonable doubt does not cure the omission complained of here. The judge's responsibility is to explain the relationship of the evidence (Bird v. United States, supra). In a case in which the defense presents evidence, a charge limited to explaining the Government's burden (632, 633) does not explain the relationship. In addition, an instruction that the defendant has no obligation to present evidence (632) obviously cannot cover the situation in which testimony is given.

The alibi defense related only to the events of October 30, 1972 and did not directly relate to the times prior to that date in which the Government claimed the conspiracy took place. However, it is apparent that if the jury had a reasonable doubt as to the presence of the appellant at the robbery, they could also reasonably doubt that the appellant participated in planning the robbery. With this consideration, the Judge's extensive charge on knowledge and intent vis a vie the conspiracy (648-650) and his application of that instruction to the substantive counts (655), without any explanation that the defense was alibi, served to place the emphasis on the mental element of the crimes, rather than on the question of appellant's physical presence at the scene. This emphasis must have diminished the impact of the defense on the jurors and led them to believe that the defense was not worth consideration. It was indeed this factor that motivated defense counsel to renew his request for the instruction at the conclusion of the charge.

It cannot be doubted that the initial request, followed by the renewal is sufficient to preserve the error for this appeal. Although defense counsel stated he would not pursue his initial request, that occurred after the Judge threatened to give an instruction on flight. This statement by

counsel in the face of the threat is not a waiver. The Judge's bargaining was premised upon his incorrect appraisal of the law. While the inference of consciousness of guilt from flight is, under the law, factually permissible, it is of substantially less significance than giving the jury complete instructions on the necessary basis for a finding of guilt. Counsel did not ask that the Judge not charge on consciousness of guilt - it was a decision made by the District Judge alone. The erroneous appraisal by the Court is something that counsel should not be saddled with for indeed, it is obvious, that he could do nothing about it. The record shows that counsel, realizing the significance of an alibi instruction, renewed his request at a time when the Court could have provided that instruction but that the request was summarily denied. The refusal to charge was fundamental error and the conviction must be reversed.

CONCLUSION

For the above-stated reasons, the judgement should be reversed and the case remanded for a new trial.

Respectfully submitted,

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